

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:	)	CSR-6176-E
)	
Petition of Cablevision of Monmouth)	
For a Determination of Effective Competition in)	
)	
Avon-by-the Sea	)	CUID No. NJ0277
Brielle, NJ	)	CUID No. NJ0280
Colts Neck, NJ	)	CUID No. NJ0556
Englishtown, NJ	)	CUID No. NJ0429
Freehold, NJ	)	CUID No. NJ0428
Howell, NJ	)	CUID No. NJ0531
Interlaken, NJ	)	CUID No. NJ0456
Manalapan, NJ	)	CUID No. NJ0430
Manasquan, NJ	)	CUID No. NJ0281
Marlboro, NJ	)	CUID No. NJ0557
Millstone, NJ	)	CUID No. NJ0617
Neptune, NJ	)	CUID No. NJ0283
Ocean, NJ	)	CUID No. NJ0161
Sea Girt, NJ	)	CUID No. NJ0284
Spring Lake, NJ	)	CUID No. NJ0286
Upper Freehold, NJ	)	CUID No. NJ0618
Wall, NJ	)	CUID No. NJ0288
Jackson, NJ	)	CUID No. NJ0346
)	
)	
CSC TKR, Inc. d/b/a Cablevision of Hamilton)	
For a Determination of Effective Competition in)	
)	
Washington, NJ	)	CUID No. NJ0588
)	
Cablevision of Raritan Valley, Inc.)	
For a Determination of Effective Competition in)	
)	
Manville, NJ	)	CUID No. NJ0290
Union Beach, NJ	)	CUID No. NJ0401

Comments of the New Jersey Division of the Ratepayer Advocate

To: Chief, Media Bureau

The New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) hereby submits its comments in opposition to the above referenced petition. On June 2, 2003, Cablevision of Monmouth, CSC TKR, Inc. d/b/a Cablevision of Hamilton, and Cablevision of Raritan Valley, Inc. (collectively “Cablevision”) filed one petition covering twenty-one (21) municipalities with the Federal Communications Commission (“FCC”) for a determination of effective competition in the above referenced communities (individually, a “Community,” and collectively, the “Communities”). The FCC issued a Public Notice on June 13, 2003, which notified the public of this filing.¹ The Ratepayer Advocate respectfully submits that the Commission should dismiss or in the alternative deny the petition at this time for the reasons set forth below.

First, Cablevision has failed to include household data and satellite penetration data reasonably contemporaneous with its filing in support of its claim of effective competition. Cablevision’s household data is based upon 2000 United States Census data (“Census” or “Census Data”) and Cablevision’s penetration data is based upon SkyTrends data as of January 31, 2003 and February 18, 2003.² There is over a three-year mismatch between the household data and the penetration data. Second, as a result of this mismatch in data, the Ratepayer Advocate submits that Cablevision fails to show and otherwise sustain its burden of proof as to whether effective competition exists at the time of the filing. Third, anecdotal data shows that in several of the Communities, specifically Interlaken, Manasquan, and Washington, the current number of households

¹ See Public Notice, Report No. 0079, Special Relief and Show Cause Petitions, released June 13, 2003. In accordance with Section 76.7(b)(1) the FCC’s rules, comments/oppositions are due twenty (20) days after the issuance of the Public Notice. See 47 C.F.R. § 76.7(b)(1).

exceed the number of households reported in the Census. When the updated data for households in those communities is used in conjunction with the penetration data, the effective competition threshold is not met. This alone shows the infirmity with the petition, as filed.

As a result, the Ratepayer Advocate submits that the FCC should dismiss the petition and direct Cablevision to refile the petition with household and penetration data reasonably contemporaneous to the date of refiling. Household and penetration data should both be current within three (3) months of one another in any subsequent filing. For example, if the filing date is August 1, 2003, the household data should be current through May 1, 2003 and the penetration data should be current through May 1, 2003.

I. CABLEVISION'S SUPPORTING DATA MUST BE CONTEMPORANEOUS TO THE DATE OF FILING IN ORDER TO PROVIDE A RELIABLE BASIS IN FACT TO REBUT THE PRESUMPTION THAT EFFECTIVE COMPETITION DOES NOT EXIST.

Section 543 of the Communications Act of 1934, as amended by Section 623 of the Telecommunications Act of 1996,³ provides that subscriber rates of cable television systems are subject to either local or federal regulation where effective competition is absent.⁴ The Cablevision systems in Monmouth, Hamilton, and Raritan Valley are currently subject to the regulatory jurisdiction of the Local Franchise Authority ("LFA") for the State of New Jersey, the New Jersey Board of Public Utilities. Under FCC rules,

² Petition, Exhibit 7. SkyTrends Direct TV and C-Band Data are current to January 31, 2003 and Dish Network Data is current to February 18, 2003.

³ Pub. L. No. 104-104, 100 Stat. 56, approved February 8, 1996, codified at 47 U.S.C. § 151 *et seq.*

⁴ 47 U.S.C. § 543(a)(2).

cable operators, who claim that effective competition exists, must satisfy one of the four tests set forth in Section 76.905(b) of the Commission's rules in order to avoid rate regulation.⁵ The burden of proof rests with the cable operator to rebut the presumption that effective competition does not exist.

A cable operator may rebut the presumption that effective competition does not exist by showing that it satisfies the “competing provider test.” Under this test, a cable operator must provide competent evidence to demonstrate that the cable system is subject to effective competition by showing that the franchise area is: (1) served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.⁶ A finding of effective competition exempts a cable operator from rate regulation.⁷ Cable operators, such as Cablevision, seeking relief from rate regulation must meet the burden of proof and affirmatively show at the time of filing that they are subject to effective competition.⁸ Thus, it is Cablevision’s burden of proof to demonstrate on the basis of competent evidence that the Communities specified in this petition are subject to effective competition under the “competing provider test.”

⁵ 47 C.F.R. § 76.905(b).

⁶ 47 U.S.C. § 623(l)(1)(B); See also, 47 C.F.R. §76.905(b)(2).

⁷ 47 C.F.R. § 76.905.

⁸ See *In re C-Tec Cable Systems of Michigan, Inc.*, 10 F.C.C.R. 1735, 1736 (1995); See also, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 F.C.C.R. 5631, 5669-70 (1993) (hereinafter referred to as “Report and Order”).

Cablevision claims that it meets the “competing provider test” because direct broadcast satellite (“DBS”) providers’ (namely DirecTV and Echostar’s Dish Network) penetration rates established by a January 31, 2003 and February 18, 2003 SkyTrends reports serve in excess of fifteen percent of the households as established by the 2000 Census in each of the Communities referenced in the petition.

The Ratepayer Advocate, however, submits that to the extent Cablevision relies upon the 2000 Census as its evidentiary support for the number of households in each Community, this approach is inadequate to overcome the presumption against effective competition. Cablevision’s reliance upon DBS penetration data and household data that are not reasonably contemporaneous in time to the filing date is insufficient to show that effective competition is present at the time of filing. Under the FCC’s rules, if the presumption is rebutted by the company, then rate regulation ends. The end of regulation is effective as of the date of filing not the date of any order issued by the FCC. As a result, Cablevision’s analysis and claim of effective competition which rest upon 2000 Census data collected in 1999 without any adjustment to reflect changes in number of households (in effect four year old data) while using SkyTrends data from (4) four to (6) months prior to the date of the petition’s filing is inadequate to show compliance with the 15% threshold of the “competing provider test” required under the FCC’s rules. The Ratepayer Advocate submits that such a mismatch in data is insufficient as a matter of law to sustain Cablevision’s burden of proof. The household and the SkyTrends data must be reasonably contemporaneous with one another and with the petition’s filing date in order to demonstrate the presence of effective competition. Without current and

contemporaneous data for both households and DBS penetration, Cablevision simply fails to carry its burden of proof and the petition should be appropriately dismissed.

The Ratepayer Advocate would object to any attempt by Cablevision to cure the mismatch of data by supplementing its filing at this time. Any submission of additional data would be a material and substantial change and revision to the filing. Any such action would require a further notice and opportunity to comment by the public to afford appropriate due process to the public. The Ratepayer Advocate assumes that the FCC intends that effective competition petitions be complete when filed and contain reasonably contemporaneous data. Cablevision's petition is neither complete nor does it contain reasonably contemporaneous data.

The FCC applies a complete when filed rule with respect to Section 271 applications in part due to the short period of time the FCC has to act on such petitions.⁹ In regard to cable effective competition petitions, the comment period is short as well, i.e. only twenty (20) days. Therefore, the Ratepayer Advocate submits that cable effective competition petitions must be complete when filed and this includes the requirement that the household data and penetration data used to support the petition must be reasonably contemporaneous with one another. If not, then the petition should be dismissed and refiled with contemporaneous data. Supplements to the filing should not be permitted.

Nevertheless, if supplements are allowed, then the filing of any supplement should result in the petition being considered a new filing with the corresponding issuance of a new public notice. The FCC already applies refiling requirements and new

⁹ See *Application of Verizon New England Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance (d/b/a Verizon Enterprise Solutions), Verizon Global Network Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Rhode Island,*

public notice requirements with regard to revisions and amendments to licensing petitions. For example, Section 21.31(e) of the FCC's rules provides that any license application will be considered a newly filed application, if there is a major amendment.¹⁰ New applications are subject to public notice requirements. Similarly, the FCC general rules contained in Section 1.9 of the FCC rules provide that any major change made by amendment results in the application being treated as a new application for purposes of filing date, **public notice** and petitions to deny.¹¹ The Ratepayer Advocate submits that any supplement to an existing cable effective competition petition should be considered a major amendment that results in a new filing date with a requirement to issue a new public notice.

II. CABLEVISION'S PRESENTATION MIXES DATA FROM DIFFERENT DATES, AND DOES NOT PRESENT COMPLETE COUNTS, MAKING IT IMPOSSIBLE TO DETERMINE IF COMPETITION EXISTS.

Cablevision's petition is supported by household data from the 2000 Census for each Community and data compiled by SkyTrends to show DBS penetration in each Community. The 2000 Census, by definition, provides population measurements as of a given time in 1999. The SkyTrends data, on the other hand, reflects results from a survey that measures direct-to-home ("DTH") counts as of January 31, 2003 and February 18, 2003¹² The two sets of data are not reasonably contemporaneous with one another. The

CC Docket No. 01-324, FCC 02-63, Memorandum Opinion and Order (rel. February 22, 2002 (*Rhode Island Order*)). The *Rhode Island Order* has a full discussion of the complete when filed rule.

¹⁰ 47 C.F.R. § 21.31(e).

¹¹ 47 C.F.R. § 1.927(h). (Emphasis added)

¹² Petition, Exhibit 7, page 1.

three-to-four year differential between the two sets of data fails to show that at the time of filing of the petition, each Community satisfied the statutory 15% threshold for removal of rate regulation.

The Ratepayer Advocate submits that the presumption against effective competition cannot be overcome unless Cablevision supports its petition with household and DBS penetration data that is reasonably contemporaneous with the date the petition is filed. A mismatch in household and DBS data supports a conclusion that the proffered evidence is unreliable and has little or no probative value as to whether the presumption has been rebutted. This analysis is consistent with Rule 403 of the Federal Rules of Evidence. In addition, the FCC has rejected the use of stale data in a cable effective competition petition.¹³ In *Charter Communications*, the cable operator relied upon 1990 Census data to support its petition filed in 2001 and put on Public Notice on May 4, 2001.¹⁴ The FCC only acted on the petition after Charter Communications submitted 2000 Census household data. The supplemental data was submitted only five days after the Public Notice. The local franchising authority, the Regional Cable Commission (“RCC”) opposed the petition arguing, in part, that the 1990 Census data was unreliable as it could not represent population growth rates since the time of the 1990 Census. The RCC did not object to the filing of the 2000 Census data and failed to assert any due process violation. As a result, without a formal objection, the Mass Media Bureau decided the matter twenty-two (22) months after the Public Notice was issued.

¹³ See *I/M/O Falcon Cable Systems Company II, A California Limited Partnership, D/B/A Charter Communications, Petition for Determination of Effective Competition in Twelve Oregon Cities*, File Nos. CSR 5678-E Through CSR 5689-E, 17 F.C.C.R. 4648 (March 15, 2002), (“Charter Communications”).

¹⁴ See Public Notice, Report No. 1306 dated May 4, 2001.

In several other cases the FCC has acknowledged the importance of having current and contemporaneous data to consider while reaffirming that the burden of proof remains with the cable operator to provide that data.¹⁵ In *Mountain Cable*, the cable operator acknowledged that the filing of 1990 Census data alone was not as reliable as a filing that included updated data. The FCC accepted the revised data since the parties agreed to its consideration. In *Texas Partners*, the FCC noted that “...the Commission accepts updated household numbers based on the 1990 Census if the cable operator demonstrates their reliability.”¹⁶ The FCC further stated that in prior cases it had allowed incorporation of a growth factor to establish current household numbers in recognition of the fact that Census data does not adequately reflect current population conditions.¹⁷ In *Texas Partners*, the updated household numbers were submitted with the initial filing and the cable operator accepted the LFA’s recommended adjustment as to DBS penetration numbers.¹⁸ In *Texas Cable*, the FCC accepted the 1999 population growth estimates filed along with the 1990 Census data in the initial filing.¹⁹ Accordingly, the FCC has repeatedly recognized that household data that is contemporaneous to DBS penetration data, and to the date of the filing of the petition, provides the greatest reliability and

¹⁵ See, *I/M/O Mountain Cable Company, D/B/A Adelphia Cable Communications, Petitions for Revocation of the Certification of the Vermont Public Service Board to Regulate Basic Cable Service Rates*, 14 F.C.C.R. 13994 (Sept. 2, 1999), ¶ 16 (“*Mountain Cable*”); See also, *I/M/O Texas Cable Partners, L.P., Petition for Determination of Effective Competition*, File Nos. CSR 5635-E, 16 F.C.C.R. 4718 (February 27, 2001), ¶ 8 (“*Texas Partners*”).

¹⁶ *Texas Partners*, at ¶ 8.

¹⁷ *Id.*

¹⁸ See also, *I/M/O Texas Cable Partners, L.P. Petition for Determination of Effective Competition in Certain Communities in Texas*, CSR 5634-E, 16 F.C.C.R. 4886 (March 2, 2001), ¶ 5, (“*Texas Cable*”).

¹⁹ *Id.*

provides the probative value necessary to grant an application claiming effective competition.

In all of these cases, however, the FCC was not presented with the specific issue raised herein by the Ratepayer Advocate. An initial filing that contains a mismatch between household data and DBS penetration data cannot be supplemented without refiling the petition and issuance of a new public notice. It is clear that the FCC requires contemporaneous data. Contemporaneous data has greater probative value than data that is too remote in time. Therefore, the FCC should decline to accept any supplemental data at this time under its holding in *Charter Communications*, supra. More than two (2) months after Cablevision's filing, no supplemental information has been filed and no supplemental filing should be allowed.

To the extent that Cablevision's petition is supported by mismatched data, this fact alone undercuts the probative value of that support and fails to undermine the presumption of no effective competition. Therefore, denial of the petition is warranted and required.

The potential for a wrong decision when there is a mismatch in data is amply demonstrated by the following. In an effort to obtain data that would either corroborate or refute the factual assertions in the petition, the Ratepayer Advocate undertook to survey several of the Communities affected. (See, Declaration of Andres Mayor attached hereto). That search specifically revealed that three Communities — Interlaken, Manasquan, and Washington—fell below the 15% threshold necessary for the determination of effective competition. In Interlaken, the 2000 Census figure proffered by Cablevision showed 386 households. But the town records show that currently there

are 395 residential households based upon tax records. This data yields a DTH penetration of 14.68%, as opposed to the 15.03% submitted by Cablevision. Also, in Manasquan, whereas the 2000 Census figure proffered by Cablevision was 2,600, the town reported that there are currently 2,752 residential households, a minimum of 16 apartment units, and 25 certificates of occupancy issued for construction of new homes (a total of 2,793). The town data yields a DTH penetration of 14.21%, as compared to the 15.27% submitted by Cablevision. Finally, in Washington, the Census figure was 4,074 while the municipality reported that there are currently 4,011 residential households, a minimum of 2 apartment units, 77 farmhouses, and 38 certificates of occupancy issued for construction of new homes (a total of 4,128). This yields a DTH penetration of 14.99% as opposed to the 15.19% number reported by Cablevision. In these cases, use of recent household data coupled with recent SkyTrends data demonstrates that the 15% threshold is not met. These results demonstrate the inherent weakness attendant to reliance on data that is neither contemporaneous nor current. Clearly, a petition that is supported by mismatched data is inadequate and insufficient to overcome the statutory presumption. There is simply no reliable and probative evidence to support any determination of effective competition at this time. Supplemental information would be required. As discussed above, the Ratepayer Advocate submits this requires refiling of the petition and issuance of a new public notice. Therefore, the Ratepayer Advocate urges the FCC to dismiss the petition at this time. Cablevision cannot on this record sustain its burden of proof that DBS penetration exceeds 15%.

In conclusion, at the very least, Cablevision must show that competitors have 15% of the households that exist at the time of filing, not 15% of the households that existed

more than three years before they filed this petition. In addition, even the SkyTrends data is several months old (from the date of the petition), and does not account for any

cancellations in the months that have lapsed between the survey and the filing of the petition. This time lag could result in customers canceling their DBS service, and thus reduces their penetration in the various markets, yet not represented in the SkyTrends data. Due to the failure to provide current and contemporaneous data of households and DBS market penetration, the petition should not be considered and should be dismissed.

Additionally, FCC regulations state that each separately billed or billable customer will count as a household. Accordingly, a single household, as counted by the census figures relied upon by Cablevision, could be two or more households, as defined in the regulations. Cablevision, which presumably knows its subscribers and their addresses, offered no evidence on whether its household numbers are adjusted for multi-customer households. In fact, Cablevision makes no mention of this issue in the petition at all. Therefore, Cablevision has failed to meet its burden of proof in this matter, and the FCC cannot determine if the fifteen percent test is in fact satisfied.

CONCLUSION

As discussed above, Cablevision's petition for effective competition is deficient and fails to adhere to the FCC's regulations. By relying upon stale and old household data, Cablevision's petition is deficient and improperly skews the data in order to support

its claim of effective competition. Additionally, Cablevision has failed to fully support its petition as discussed above. In view of the above, the Ratepayer Advocate asks that the FCC dismiss the petition and affirmatively order Cablevision in any refiling, to supply reasonably contemporaneous household and DBS penetration data.

Respectfully submitted,

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

By: _____
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Dated: July 1, 2003

CC: Service List